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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 350

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,

Appellees.

BRIEF FOR APPELLEES

HAMILTON WARD,
Attorney General of the
State of New York.

WENDELL P. BROWN,
Third Assistant Attorney General,
Of Counsel.

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IN THE

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No. 350

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Appellees.

BRIEF FOR APPELLEES

The Opinion of the Court Below.

The opinion in the District Court, Southern District of New York, is reported in 41 F.(2d) 395, and appears at pages 53-58 of the transcript of record.

A review of the opinion appeared in the Columbia Law Review for November, 1930 (XXX Columbia Law Review 1070-1071) and is printed as an appendix to this brief (p. 46).

Statement of the Case.

This suit was brought under Judicial Code, § 24 [28 U. S. C. A. § 41 (1)], to enjoin the defendants, public

officers of the State of New York charged by law with the duty of assessing and collecting taxes due the State, from collecting a certain corporate franchise tax assessed against the plaintiff-appellant under the provisions of Article 9-A of the New York Tax Law. The plaintiff asserted the unconstitutionality of the statute in so far as it permits the inclusion of income received from the rental of copyrighted motion picture films in the net income which furnishes the measure of the tax. Plaintiff moved for an interlocutory injunction. Defendants moved for the dismissal of the bill of complaint, as amended, upon the ground that it did not state facts sufficient to constitute a cause of action. The motions were heard pursuant to § 266 of the Judicial Code (28 U. S. C. A. § 380) by a statutory court of three judges, which on June 10, 1930, denied the plaintiff's motion for an interlocutory injunction and dismissed the amended bill of complaint upon the merits. From that order, the plaintiff has appealed to this court.

The Statute

Article 9-A of the New York Tax Law imposes an annual franchise tax upon business corporations. In the case of domestic corporations, the tax is for the privilege of exercising their franchises in this State in a corporate or organized capacity; in the case of foreign corporations, for the privilege of doing business in this State (§ 209). The tax is for a year in advance commencing November first of each year and is measured by the entire net income of the corporation for the preceding calendar or fiscal year, which entire net income is presumably the same as the entire net income which the corporation is required to report to the United States plus any income received as dividends on stock or any interest received on bonds of any character, and without deduction for taxes paid on either profits or

net income to the Government of the United States or for any specific deduction allowed by any other authority (§§ 209, 208).

The tax so imposed is in lieu of all taxes on personal property and on capital stock (§ 219-j).

Corporations liable to taxation under the article are required to report to the State Tax Commission on or before July first of each year, or within thirty days after the making of report of entire net income to the United States Treasury Department for any fiscal or calendar year preceding said first day of July, the information necessary to enable the Commission to compute the tax (§ 211). The Tax Commission is thereupon to audit and state the account of the corporation, to compute the tax thereon and give notice of its assessment to the corporation (§§ 219-a, 219-b). The rate is 4½ per centum of the entire net income of the corporation or portion thereof taxable within the State (§ 215).

The tax is due and payable on or before the first day of January of each year, or within thirty days after notice of the tax has been given to the corporation if given subsequent to the first day of December of the year for which the tax is imposed (§ 219-c).

If the taxpayer be dissatisfied with the audit made by the Tax Commission, it may file with the Commission at any time within one year from the time of such audit an application for revision, upon which application the Commission is required to grant a hearing, and if it shall be made to appear upon any such hearing by evidence submitted to it, or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded or that payment has been illegally made or exacted of any such account, or if it appears that the tax as originally assessed was less than should have been exacted, the Commission is required to re-settle the same according to law and the

facts by increasing or diminishing the tax or other charges, and adjust the accounts accordingly (§ 218). Provision is made for credit or refund to the corporation of the amount of any overpayment made by it (Id.).

The determination of the Commission is subject to review by certiorari to the State Supreme Court provided application therefor be made within ninety days after service of the notice of the Commission's final determination and the full amount of the taxes, percentage, interest and other charges audited and stated be deposited with the Tax Commission before making the application and an undertaking be given for the costs of the proceeding (§ 219).

For convenience a copy of this article of the Tax Law, as amended to the close of the legislative session of 1929, is annexed as an appendix to this brief (pp. 48-70).

The Facts.

The plaintiff is a corporation organized under the laws of the State of New York for the exploitation of motion picture films. On or about the 11th day of October, 1929, it filed with the State Tax Commission its annual franchise tax report under article 9-A of the Tax Law for the tax year beginning November 1, 1929, showing its operations and income for its fiscal year ended June 30, 1929 (R. fol. 10). From this report, it appeared that its gross income for that year, as reported to the United States Treasury Department, was $385,163.35; that its allowable deductions for expenses incurred in the conduct of its business aggregated $153,790.41, and that its entire net income upon which it was subject to taxation by the Federal Government was $231,372.94, being the difference between those two sums (R. fols. 28-31).

The plaintiff, in its said report to the State Tax Commission, claimed as a further deduction from its

said gross income the sum of $162,588.98, which it said consisted of royalties received by the corporation on copyrights "owned by it or its affiliated companies and granted by the United States Government" (R. fol. 33). This further deduction, if allowable, would reduce the entire net income to $68,783.96.

The plaintiff did not in its report furnish to the Tax Commission any proof or information from which the Commission could determine the amount of income which the corporation derived from copyrights owned by it, the amount of income derived from copyrights owned by its affiliated companies or the nature of the plaintiff's interest, if any, in the latter copyrights, and submitted no proof or information from which the Commission could determine the portion of the corporation's expenses properly to be allocated to its business of leasing copyrighted films or the portion thereof to be allocated to its business of leasing films which were not copyrighted.

Upon this report, the Tax Commission assessed a tax against the plaintiff in the sum of $10,411.79, being at the statutory rate of 4½ per cent upon the amount of net income so reported to the Federal Government without deduction of any amount on account of royalties alleged by the corporation to have been included therein (R. fol. 12). The income of plaintiff was not consolidated with the income of any of its subsidiary or affiliated companies shown on Schedule 23 of its report. Notice of the assessment was given to plaintiff on or about the 29th day of January, 1930, and the tax became due and payable thirty days thereafter.

In its bill of complaint the plaintiff alleged generally that it was the "owner and proprietor" of the copyrights from which $162,588.98 of its income was received (R. fols. 9, 10). From Schedule A, annexed to the complaint, it appears, however, that copyrights from which

an income of but $1,842.36 was received were issued to the plaintiff, and that the copyrights from which the balance of the income of $162,588.98 was received were issued to other corporations (R. fols. 19-27). In the affidavit of Mr. Faralla, presented by the plaintiff upon the motion for an interlocutory injunction, it is stated (R. fol. 36):

> "All of said copyrights, however, whether or not standing in the name of plaintiff corporation, are and were during the period aforesaid owned by plaintiff corporation, the latter having advanced and paid the costs of production thereof and having exclusive control and disposition thereof, and being entitled to all the income therefrom except certain agreed commissions and percentages paid in certain cases to corporations handling the production thereof upon plaintiff's order and at plaintiff's expense."

Subsequent to the commencement of the suit and to the argument of the motion for an interlocutory injunction, the plaintiff applied to the State Tax Commission for a revision of the said assessment, upon which application a hearing was held before the said Commission, at which time the Commission announced that it would affirm the assessment (R. fol. 51).

Following such hearing, the plaintiff amended its bill of complaint by adding the allegation that of the deductions on account of expenses $49,151.37 consisted of its expenses in procuring the aforesaid income of $162,588.98 from copyright royalties (R. fol. 51).

It is conceded by the appellant that the tax assessed against it was assessed in exact accordance with the statute.

Summary of Argument.

I. Article 9-A of the New York Tax Law is not unconstitutional as to the appellant because of the inclu-

sion of royalties from copyrights in the net income which furnishes the measure of the tax.

A. The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though there be included in the measure of the value of such privilege property or income which is exempt from direct taxation.

B. The tax imposed by Article 9-A of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State, and is a true excise tax. It is not a tax upon property or income, the net income of the corporation for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

C. New York has not attempted under the guise of an excise tax to tax income from copyrights.

II. The appellant is not entitled to the injunctive relief asked, even though royalties from copyrights may not be included in the measure of the tax, because its tender of the tax due even on that theory was insufficient in amount.

A. The appellant, in computing the tax which it has tendered, has deducted income from copyrights which it did not own.

B. The appellant, in computing the tax which it has tendered, has deducted from its gross income not only the total amount of income from copyrights but also its expenses incurred in procurring such income.

ARGUMENT

POINT I

Article 9-A of the New York Tax Law is not unconstitutional as to the appellant because of the inclusion of royalties from copyrights in the net income which furnishes the measure of the tax.

A

The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though there be included in the measure of the value of such privilege property or income which is exempt from direct taxation.

This well established rule has been applied by this Court in cases where the tax was measured by the value of capital stock, by the amount of dividends declared on capital stock, by the amount of deposits in bank, by the value of decedents' estates and by the net income of corporations, and has been held to apply to federal bonds, property in interstate commerce, patents and copyrights, and the income from such properties.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 162-163;
Society for Savings v. *Coite*, 6 Wall. 594;
Provident Institution for Savings v. *Massachusetts*, 6 Wall. 611;
Hamilton Co. v. *Massachusetts*, 6 Wall. 632;
Home Insurance Co. v. *New York*, 134 U. S. 594;
People ex rel. United States Aluminum Printing Plate Co. v. *Knight*, 174 N. Y. 475;
Kansas City, Fort Scott & Memphis Ry. Co. v. *Kansas*, 240 U. S. 227;
National Lecther Co. v. *Massachusetts*, 277 U. S. 413;
International Shoe Co. v. *Shartel*, 279 U. S. 429;
Hump Hairpin Co. v. *Emmerson*, 258 U. S. 290;
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113, 120;
United States Glue Co. v. *Oak Creek*, 247 U. S. 321, 328.

In *Flint* v. *Stone Tracy Co., supra,* a federal tax on corporations imposed "with respect to carrying on or doing business" and measured by net income, was held to be an excise, not a direct tax on property or income, and to be valid notwithstanding the fact that net income from tax-exempt municipal bonds was included in the measure of the tax. This court, after discussing the previous decisions of the court, said (p. 163):

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. *The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.*" (Italics ours.)

The opinion continues (at p. 165):

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This case may not be distinguished from the case at bar upon the ground that the statute there involved was a federal statute, for Congress has no greater authority to burden the instrumentalities of the states or their

municipalities than the states have to burden those of the Federal Government. *Collector* v. *Day*, 11 Wall. 113, 125-128; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 583-585; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 521. Indeed, the court finds previous authority for the proposition in the cases involving state statutes hereinafter discussed and expressly states the rule as applying to the "taxing power of the State or Nation" (p. 163, quoted *supra*).

As this Court said in *Osborne* v. *Mobile*, 16 Wall. 479:

> "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity."

In *Society for Savings* v. *Coite*, *supra*, a franchise tax of Connecticut imposed upon savings banks for the privilege of doing business within the State, measured by a percentage upon the total amount of their deposits on a certain day, was sustained notwithstanding the fact that a considerable part of such deposits was invested in securities of the United States expressly declared by Congress to be exempt from taxation by State authority.

Provident Institution for Savings v. *Massachusetts*, *supra*, is to the same effect.

In *Hamilton Co.* v. *Massachusetts*, *supra*, a statute of Massachusetts requiring corporations having a capital stock divided into shares to pay a franchise tax of a certain percentage upon "the excess of the market value" of all such stock over the value of its real estate and machinery was similarly held to be valid though the corporation held large amounts of United States Government bonds which were elements contributing to the value of the capital stock.

In *Home Insurance Co.* v. *New York*, *supra*, a statute of New York imposed a tax upon "the corporate fran-

chise or business" of corporations doing business within the State measured by the extent of the dividends made or declared during the year. The court held that the tax was an excise or privilege tax and not violative of the provisions of a federal statute exempting bonds of the United States from taxation, although a portion of the dividends may have been derived from interest on capital invested in such bonds.

In *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight*, *supra*, the State Court of Appeals had under consideration a statute (§ 182 of the present Tax Law) which, like the statute now under consideration, was "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State," but which was to be computed upon the basis of the amount of its capital stock employed within the State during the year. The capital of the relator corporation was substantially all invested in Letters Patent issued by the United States. The court held that the tax imposed by the statute was not one upon property, but an excise or privilege tax, and was constitutionally unobjectionable because of the inclusion of the value of the patent rights in the measure of the tax.

In *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, *supra*, a statute of Kansas imposed a tax upon domestic corporations to be computed according to the amount of their paid-up capital stock. The corporation objected that the effect of the statute was to tax its income from interstate commerce. Mr. Justice Hughes, writing for the court, said (at p. 232):

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate fran-

chise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, *supra*; *Ashley* v. *Ryan*, 153 U. S. 436; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 559, 560. And, agreeable to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Mining Co.* v. *Massachusetts*, *supra*), to emphasize the necessary caution that 'every case in-

> volving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

An attempt has been made to distinguish these latter cases upon the ground that the impact is more direct in the case of a tax measured by net income than of a tax measured by capital stock, by dividends on capital stock or by deposits. It is unquestionable, however, that the measurement of an excise by the value of the corporation's capital stock including the *value* of tax-exempt assets much more closely touches those assets than a measurement of such an excise by the entire *net* income of the corporation. In the one case, the value of the assets themselves is included in the measure; in the other the annual income from such assets is merely included in the gross income from which, after deduction of all the expenses of the corporation, the net income measure is obtained. The value of the capital stock which furnishes the measure consists of the value of the corporate assets less liabilities. If the assets consist in whole or in part of tax-exempt properties, those properties are used *pro tanto* to measure the tax. In such case the impact is much more direct than in the case of a net income measurement. We are referring more particularly to those taxes which are measured by the *actual value* of the capital stock, as determined by the market, by a reference to assets and liabilities or to the rate of dividends paid, such as the tax imposed by § 182 of the New York Tax Law. That was the nature of the capital stock taxes discussed in two of these cases. In a few instances, statutes measure the privilege by the *par value* of the stock. Such an instance is the minimum tax provision of § 214, subd.

10 of our Tax Law. Even then, the capital stock represents, of course, the assets of the corporation and reflects, though perhaps less closely, investments in tax-exempt securities or property. (See *Kansas City, etc.* v. *Kansas, supra*).

In the case of bank deposits, the measurement is by a part of the assets of the bank—the amount of money on deposit on a given day—and where a part of such assets is invested in tax-exempt securities, the measure includes the value of such securities. It is not true that the measure is the debts of the bank to its depositors, although, of course, the relationship of debtor and creditor exists. The measure consists of the assets (money) which the bank acquired and which furnished the consideration for the debts. (See *Society for Savings* v. *Coite, supra*, at p. 609.)

International Shoe Co. v. *Shartel, supra, Hump Hairpin Co.* v. *Emmerson, supra, Underwood Typewriter Co.* v. *Chamberlain, supra, United States Glue Co.* v. *Oak Creek, supra*, and *National Leather Co.* v. *Massachusetts, supra*, further establish the principle that an excise on a corporation may be measured by its outstanding capital stock or by its net income even though a part of its capital is used in, or some of its income is derived from, interstate commerce or business without the State.

Similarly a State inheritance tax may be measured by including the value of United States bonds held by the decedent.

> *Plummer* v. *Coler*, 178 U. S. 115.
> *Blodgett v. Silberman*, 277 U. S. 1, 12.
> *Greiner* v. *Lewellyn*, 258 U. S. 384.

The net income of corporations from transactions in interstate commerce may also be directly taxed, in a manner not unreasonably to interfere with such com-

merce, under a general income tax law. *United States Glue Co.* v. *Oak Creek, supra.* This Court held in *Long* v. *Rockwood*, 277 U. S. 142, that income from patents could not be directly taxed by the states, a majority of the Court being of the opinion that such income was more analogous to income from federal bonds than to income from interstate commerce. The question is irrelevant to the present discussion, however, for the tax here involved is an excise and not a tax on the income.

The appellant relies upon several cases which it interprets as establishing principles at odds with the rulings of this Court in the cases which we have cited, viz.:

Gillespie v. *Oklahoma*, 257 U. S. 501;
Clallam County v. *United States*, 263 U. S. 341;
Jaybird Mining Co. v. *Weir*, 271 U. S. 609;
Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 275 U. S. 136;
Miller v. *Milwaukee*, 272 U. S. 713;
Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218;
Long v. *Rockwood*, 277 U. S. 142;
National Ins. Co. v. *United States*, 277 U. S. 508;
State ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313.

None of these cases detracts in the slightest degree from the authority of the decisions which we have cited.

The tax under consideration in *Gillespie* v. *Oklahoma, supra*, was a *direct* tax upon personal income. The court held that net income from a federal instrumentality—in that case oil leases of Indian lands—could not be taxed. No question of the measurement of an *excise* by net income was involved.

Clallam County v. *United States, supra*, involved a *direct* tax on property of a corporate agent of the United States created for the purpose of providing weapons for the war.

Jaybird Mining Co. v. *Weir, supra*, involved a *direct ad valorem* property tax on ores.

In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin, supra*, a case involving the question of immunity of interest on federal bonds, the tax was based not on *net* income but on *gross* income. The court, expressly distinguishing its former decisions, notably *Flint* v. *Stone Tracy Co., supra*, upon that ground, said (p. 140):

> "The fundamental question, often presented in cases similar to these, is whether by the true construction of the statute the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation. *Society for Savings* v. *Coite*, 6 Wall. 594; *Home Insurance Co.* v. *New York*, 134 U. S. 594.
>
> "Section 76.34 undertakes to impose a charge not measured by dividends paid, as in *Home Insurance Co.* v. *New York*, 134 U. S. 594, nor by *net income*, as in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; and those cases are not controlling. The distinction between an imposition the amount of which depends upon dividends or *net receipts* and one measured by *gross returns* is clear. *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328, and earlier opinions there cited." (Italics ours.)

The distinction is clearly stated in *U. S. Glue Co.* v. *Oak Creek, supra*, in the following language (pp. 328, 329):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference

> between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

In *Miller* v. *Milwaukee*, *supra*, the statute under consideration was the *direct* personal income tax law of Wisconsin, the question presented being whether a provision of that law taxing only so much of corporate dividends received by a stockholder as corresponded to corporate income not taxable to the corporation was a valid provision.

The statute involved in *Panhandle Oil Co.* v. *Mississippi*, *supra*, was one imposing a tax on dealers in gasoline for the privilege of selling that product, measured by the *number of gallons sold*. As to gasoline purchased by the United States from such a dealer, the effect of the statute was, of course, to increase the cost of the gasoline to the Federal Government by the amount of the tax imposed upon the sale. This, the court said, was "to tax the United States—to exact tribute on its transactions and apply the same to the support of the State" (p. 222).

The tax involved in *Long* v. *Rockwood*, *supra*, was a *direct* tax on personal income.

National Life Ins. Co. v. *United States*, *supra*, involved a *direct* federal tax on *gross* income.

The statute involved in *State ex rel. Missouri Ins. Co.* v. *Gehner*, *supra*, imposed a *direct* property tax.

Not one of these cases has any bearing on the question of the measurement of a corporate franchise tax by net income.

It is, we submit, definitely settled law that the states may impose a franchise tax on corporations measured

by *net* income even though there be included in the *gross* income from which the figure of net income is obtained income which is itself exempt from taxation.

B

The tax imposed by article 9-A of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State, and is a true excise tax. It is not a tax upon property or income, the net income of the corporation for the preceding year being used merely as the measure of the value of the future exercise of the privilege.

There can be no doubt that New York *intended* by Article 9-A of its Tax Law to impose an excise or privilege tax. It has entitled the article "Franchise Tax on Business Corporations," and it has enacted that every corporation not exempted by the article shall pay in advance "an annual franchise tax" which, in the case of domestic corporations, is "for the *privilege* of exercising its franchise in this State in a corporate or organized capacity." The *net* income of the corporation for the *preceding* calendar or fiscal year is used, but merely as the measure of the value of the privilege. The tax is in lieu of all taxes on personal property and on capital stock.

That the tax so imposed is *in fact* an excise or privilege tax has been definitely settled by the decisions in the following cases:

People ex rel. Bass, Ratcliff & Gretton, Ltd. v. *State Tax Commission*, 232 N. Y. 42, affd. 266 U. S. 271;

New York v. *Jersawit*, 263 U. S. 493, 496;

Home Insurance Co. v. *New York*, 132 U. S. 594, *supra;*

People ex rel. United States Aluminum Printing Plate Co. v. *Knight*, 174 N. Y. 476, *supra;*

New York v. *Latrobe*, 279 U. S. 421;

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203;

Society for Savings v. *Coite*, 6 Wall. 594, *supra;*
Provident Institution for Savings v. *Massachusetts*, 6 Wall. 611, *supra;*
Hamilton Co. v. *Massachusetts*, 6 Wall. 632, *supra;*
Kansas City, Fort Scott & Memphis Ry. Co. v. *Kansas*, 240 U. S. 227, *supra;*
Anderson v. *Forty-two Broadway Co.*, 239 U. S. 69;
Roberts & Schaefer Co. v. *Emmerson*, 271 U. S. 50.

Construing this *identical statute* in a case involving the constitutionality of the operation of a segregation of assets formula provided by the statute for the apportionment of income to sources within and without the State, as applied to a corporation which derived no net income from the local business, this Court in the *Bass, Ratcliff & Gretton* case, said (at pp. 280, 284):

> "We see no reason to doubt the accuracy of the statement made by the Court of Appeals in the present case that the franchise tax imposed by the statute is 'primarily a tax levied for the privilege of doing business in the State.' *It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year. See New York* v. *Jersawit*, 263 U. S. 493, 496. * * *
>
> "Furthermore, the statutory method of apportionment not being shown to be arbitrary or unreasonable, we think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income. There is no sufficient reason why a foreign corporation desiring to continue the carrying on of business in the State for another year—from which it expects to derive a benefit—should be

> relieved of a *privilege tax* because it did not happen to have made any profit during the preceding year." (Italics ours.)

In *New York* v. *Jersawit*, *supra*, the question was before this Court whether the tax imposed by this statute could in case of bankruptcy, be apportioned to a fraction of the tax year which has elapsed when the corporation goes out of business. The court held that it could not be apportioned because it was a tax for a future privilege, saying (p. 496):

> "*We are of the opinion that the tax is a tax upon the right conferred.*"

In *Home Insurance Co.* v. *New York*, *supra*, this Court had under consideration a New York statute (L. 1881, ch. 361) which was the predecessor of the present Article 9-A. That statute imposed a tax upon "the corporate franchise or business" of corporations doing business within the State, measured by the dividends declared on the capital stock. On the question of the nature of the tax, the court said (p. 606):

> "In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is *not a tax on the capital stock or property of the company, but upon its corporate franchise*, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United State." (Italics ours.)

We have discussed the decision in *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight*, *supra*, in a former Point. In its opinion in that case the Court of Appeals said (p. 478):

> "Finally, there is a franchise tax on corporations which is payable annually to the state, 'com-

> puted upon the basis of the amount of its capital stock employed within this state.' (Id. § 182.) *This is not a tax upon property*, although it is measured by the value of property, but upon the right of a corporation to exist and exercise the powers granted by its charter."

Section 181 of the New York Tax Law imposes a license tax on every foreign corporation doing business in the State, measured by the amount of its capital stock employed in the State during the first year of carrying on business here, which, like the tax under review, is "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State." In the case of stock without par value, the tax is computed at a flat rate per share. In the recent case of *New York* v. *Latrobe*, *supra*, this Court treated the statute as one imposing an excise or franchise tax and upheld it as such, as against the claim that it had the effect of unconstitutionally taxing property without the State and was in violation of the equal protection clause of the Fourteenth Amendment. The court said (pp. 426-428):

> "The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the *privilege* which the state extends to it and is a proper element to be taken into account in fixing a *tax on the privilege*. * * *
>
> Although permissible, a *franchise tax need not* be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business (*Southwestern Oil Company* v. *Texas*, *supra*; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Williams* v. *Fears*, 179 U. S. 270, 275; see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562), or the particular form in which it is carried on (see *Home*

Insurance Co. v. *New York*, 134 U. S. 594, 606), so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See *Roberts & Schaefer Co.* v. *Emmerson, supra*, at p. 57.

"We think that the *measurement* of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the *privilege granted by the state* and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity." (Italics ours.)

Cases construing similar statutes of other states are numerous. We have cited a few of them. In *Alpha Portland Cement Co.* v. *Massachusetts, supra*, the court said of a Massachusetts statute which measured a privilege tax by net income of the year for which the tax was imposed (p. 216):

"Counsel for the Commonwealth assert: 'The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce.' 'The taxes complained of were excises and not property taxes.' 'Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts.' See *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47.

"This view of the nature of the exaction was adopted by the court below, and we think it is the

> correct one. *The right to lay taxes on tangible property or on income is not involved;*" (Italics ours.)

The fact that income from interstate commerce was there involved instead of income from federal, state and municipal bonds, as in the *Macallen* case, is unimportant on the question of the *nature* of the tax, for, as we have seen, either may be included in the measure. In the *Macallen* case, the statute was held unconstitutional as to the bond income not because such income might not be included, but because Massachusetts, *under the guise of a privilege tax, had deliberately set out to include it.* This aspect of the matter will be discussed in a subsequent point.

Of the federal statute of 1909, under consideration in *Flint* v. *Stone Tracy Co., supra,* this Court said in *Anderson* v. *Forty-two Broadway Co., supra,* (p. 72):

> "As has been repeatedly pointed out by this Court in previous cases (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, 150, 15; *McCoach* v. *Minehill Railway*, 228 U. S. 295, 306 *et seq.; United States* v. *Whitridge*, 231 U. S. 144, 147; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414), the act of 1909 was not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of business in a corporate capacity, the tax being measured by reference to the income in a manner prescribed by the act itself."

This brings us to a discussion of *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, in which the Court of Appeals said that in substance though not in form the tax imposed by this article of the Tax Law was the same as if imposed directly upon income. The question there was not whether the State might constitutionally include interest from federal bonds in the measure, as the appellant infers, but

whether the effect of the statute was not to tax income earned without the State. Under the statute, interest on bonds *of any kind* was to be included in the net income furnishing the measure of the tax, but the bonds themselves were not to be included in the segregation of assets by which the income was to be allocated to sources within and without the State. The relator corporation, which owned bonds, presumably of railroads and of foreign countries (see opinion, p. 52), attacked the allocation formula as inequitable in that its effect was to measure the tax by income from its extra-state business. The court, upholding the corporation's contention in that respect, held that the remedy was to subtract the interest on the bonds rather than to add the value of the bonds to the segregation formula. The case involved no question whatever of the immunity from taxation of federal bonds or any other specie of property.

A year after this decision, the *same* court had before it *People ex rel. Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission, supra*, where was involved the constitutionality of the operation of the *same* segregation formula. Sustaining the constitutionality of the statute, the court said of its former decision (p. 46):

> "The tax is denominated a franchise tax and although we have said in another connection (*People ex rel. Alpha P. C. Co.* v. *Knapp, supra*, p. 57) that 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income * * *. This tax is equivalent to a tax upon relator's income,' *it is primarily a tax levied for the privilege of doing business in the state.*" (Italics ours.)

This decision was affirmed by this Court in an opinion from which we have already quoted (p. 19, ***supra***).

If the language of the court in *Alpha Portland Cement Co.* v. *Knapp*, *supra*, is to be construed as holding that the tax imposed by the statute under consideration is a direct tax on property or income, it has been definitely overruled by its own later decision and by the decision of this Court in the *Bass, Ratcliff & Gretton* case, where it was expressly held to be "not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year."

The appellant cites (Brief, p. 19) *De La Vergne M. Co.* v. *State Tax Commission* 211 App. Div. 227, aff'd 241 N. Y. 517, decided after the decision of this Court in the *Bass, Ratcliff & Gretton* case. The Court of Appeals wrote no opinion in the case. The Appellate Division, far from saying that the tax in practical operation was a tax on income, cited the opinion of this Court in *New York* v. *Jersawit*, *supra*, to the contrary, saying (pp. 230, 231):

> "During the year 1918 the United States was the exclusive owner of the stock of the corporation and was likewise, through the Cramp Company, the exclusive manager of its affairs. It was the net income received by the corporation during that year which was made the basis of the tax. Therefore, *if we regard* the tax as being essentially a tax upon net income it was a tax upon income accruing to the United States and consequently invalid as a tax upon Federal property. The same result follows *if we regard* it as a tax upon the privilege of doing business or exercising a franchise. The taxable status of the De La Vergne Company for the year November 1, 1919, to October 31, 1920, was determinable on November 1, 1919. (*State of N. Y.* v. *Jersawit*, 263 U. S. 493.) In the case cited Mr. Justice Holmes said: 'We are of opinion that the tax is a tax upon the right conferred, not upon the exercise of it'." (Italics ours.)

Mention has been made of three or four instances where in the administrative provisions of Article 9-A the tax imposed by § 209 has been referred to as a tax "on" or "upon" net income. These references without exception came into the statute by amendment after its original enactment. It is obvious that they were the result of certain looseness and inaccuracy on the part of the draftsman. It will be noted that throughout the article the usual expression is "upon the basis of" net income (§§ 209; 214, subd. 7; 214, subd. 10), or "based on" net income (§§ 211, subd. 1; 214, 1st par.; 214, subd. 10; 219-d), or, as in two instances, net income used or included in "measuring a franchise tax" (§§ 212; 214, subd. 8).

The inaccuracy of expression in these amendments does not impress us as having any considerable weight on the question of the nature of the tax. Indeed, this Court, in *Roberts & Schaefer Co.* v. *Emmerson, supra*, held a statute of Illinois to impose an excise tax even though the section imposing it read that the tax, denominated a license fee or franchise tax, was "on" each one hundred dollars of a proportion of the capital stock. The statute provided (p. 52 of 271 U. S.):

> "Each corporation for profit * * * organized under the laws of this State, or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents *on* each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State." (Italics ours.)

On the question of the nature of the tax, this Court said (pp. 55, 56):

> "The tax is not a property tax imposed on shares of stock or on the assets of the corporation.

> It is a tax on the corporate franchise, which includes the privilege, whether exercised or not, of issuing and using when issued, a particular kind of stock known as 'no-par value stock'."

The tax is, of course, no less an excise because imposed upon the *privilege* of exercising the corporate franchise, instead of upon the *exercise* of the privilege, as in *Flint* v. *Stone Tracy Co., supra*, and *Macallen Co.* v. *Massachusetts, supra*. Appellant's rather elaborate argument to the contrary, which we confess our inability to follow completely, entirely overlooks the fact that the taxes which this Court had under consideration in *People ex rel. Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission, supra*, *New York* v. *Jersawit, supra*, *New York* v. *Latrobe, supra*, *Roberts & Schaefer Co.* v. *Emmerson, supra*, and *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas, supra*, were taxes upon a privilege granted, not upon the exercise of the privilege. As a matter of fact, most excises are of that nature.

As we read the appellant's brief, its position is that the tax is neither a tax on property nor an excise, but is something in between which it describes as "an indirect tax on income." We think that, as it is not a tax on property, it is an excise and that to call it an indirect tax on income is but another way of saying that it is an excise. As Mr. Chief Justice Fuller said in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 557:

> "And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We do not, of course, dispute the proposition that a tax which is in form a tax upon a privilege may in certain cases and to a limited extent be held to lay a direct tax upon property. Such was the decision of this Court in *Northwestern Insurance Co.* v. *Wisconsin*, *supra*, where the tax was measured by *gross* income. It carefully distinguished, however, cases where *net* income furnished the measure. The Court also so held in the *Macallen* case, where net income was used as the measure, but only because Massachusetts had deliberately set out to reach the tax-exempt income. This Court, in *Flint v. Stone Tracy Co.*, *supra*, expressly held that net income might be used as the measure even though it included income from tax-exempts. We know of no case which even intimates that this may not be done where the inclusion, as here, is incidental merely and not the result of an attempt to reach that which the State is without power to tax.

It is interesting to note that the appellant's argument on this point constitutes a complete reversal of its original position, for in its bill of complaint and in its assignment of errors it has repeatedly described the tax as a franchise tax measured by net income (R. fols. 11, 12, 65, 66).

It is submitted that the court below was entirely correct when it said (R. fol. 59):

> "It cannot be doubted that this tax is not directly on income but is purely an excise."

C

New York has not attempted under the guise of an excise tax to tax income from copyrights.

The effect of the decisions which we have cited and which seem to be conclusive upon the point at issue is in no way impaired by the recent decision of this Court

in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, much relied upon by the appellant. As appears from this Court's opinion in that case, the State of Massachusetts has a statute imposing a tax, denominated an excise tax, upon corporations, measured in part by the value of the "corporate excess" and in part by the net income of the corporation. Prior to 1925, the statute *expressly excluded* from the net income which was to measure the tax all interest received upon bonds, notes and certificates of indebtedness of the United States, and the definition contained in the statute had the effect also of excluding from such measure interest on state, county and municipal bonds. In 1925, the Legislature amended the statutory definition of net income for the *very purpose*, as the court found, of *including* the income from these tax exempt securities which had theretofore been expressly excluded. This Court held that the *real purpose* of the amendment was to tax the exempt income rather than to lay a legitimate tax upon the franchises of the corporation, and that for that reason the act was unconstitutional as to such income. Mr. Justice Sutherland was careful throughout his opinion to make this meaning clear. We quote from pages 629, 630:

> "In the consideration of such legislation, the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, it cannot tax *them* in any form. Words which, literally considered, import a tax upon something else,—a tax, for example, as here, upon the privilege of doing business measured in part by the amount of non-taxable interest received—may, nevertheless, be adjudged to lay a tax upon the interest, *if that purpose be fairly inferable from a consideration*

> *of the history, the surrounding circumstances, or the statute itself considered in all its parts.* See *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 510, 521." (Italics ours.)

Quoting from the opinion of the court in *Miller* v. *Milwaukee*, 272 U. S. 713, 715, the opinion continues:

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of *a scheme to reach a prohibited result.* If the *avowed purpose or self-evident operation of a statute* is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. * * * A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed *with a different intent and not aimed at them*, but it becomes a more serious attack upon their immunity when they are its *obvious aim.*" (Italics ours.)

Further on in the opinion Mr. Justice Sutherland said (pp. 631, 632):

> "In the present case, it appears that the original statute exempted from consideration as a part of the measure of the tax all interest upon the non-taxable securities. The amended act now in force has the effect of repealing this original provision and imposing a burden upon the securities from which, by express language, they had theretofore been free. This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, *for the very purpose* of subjecting these securities *pro tanto* to the burden of the tax. (Italics ours.)

The opinion gives no intimation that the previous decisions of this Court which we have cited above are

to be deemed overruled or even modified. Rather does the Court cite those decisions with approval and distinguish them upon the ground that the statutes involved in them imposed a legitimate tax upon the privilege and no attempt had been made to reach the non-taxable subject (p. 628):

> "The court below predicates its decision upon a series of decisions of which *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163-165, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property. See also *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611. The *distinction* pointed out in these cases is between an *attempt to tax* the property or income as such and *to measure* a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject *aimed at*, and that any burden put upon the non-taxable subject by its use as a measure of value was *fortuitous and incidental.*"

In the instant case, not only has the statute been heretofore authoritatively construed as imposing a true excise tax, but there can be no suspicion that there has been any attempt by our Legislature to reach or tax the exempt income from copyrights. The tax, which is for the privilege of exercising the corporate franchise, is measured by entire net income, which, as the statute provides, is "presumably the same as the entire net income which such corporation is required to report to the United States" with certain additions not material to the present discussion. Income from copyrights is included in the federal definition of gross income and

is not deductible in determining federal net income. It follows as a matter of course that such income is included in the entire net income which furnishes the measure of the State tax. Such inclusion results from the State's adoption of the federal definitions and figures and is purely incidental and fortuitous. Copyrights are not *mentioned* in our statute. No amendment of the act has been made having the purpose of reaching royalties or income therefrom. From the first enactment of the statute, such royalties have been included in the measure of the tax because they were included in the measure of the federal tax.

It is further to be noted that our statute, unlike the Massachusetts statute construed in the *Macallen* case, measures the tax, not by the income of the year for which the tax is imposed, but by the income of a year ending in most cases ten months before the tax year and in the instant case, because the corporation reports on a fiscal year basis, four months before the tax year. This furnishes an additional distinction from the *Macallen* case and a strong additional reason why the tax may not be regarded as a tax upon property.

The argument has been made that because income from copyrights is included in the measure of the tax, the Legislature must have attempted to include it. The fact is, however, that assessments under our statute do not include income from tax-exempt sources in one case out of a thousand, for few business corporations hold securities or property which are exempt from taxation. If the fact that tax-exempt income is included in a particular case is sufficient evidence of an improper legislative purpose to include it, the distinction between the taxation of exempt property or net income therefrom and the measurement of a franchise tax by such property or income which this Court has been careful to preserve in such cases as *Flint* v. *Stone Tracy Co.*,

Miller v. *Milwaukee*, *Kansas City Ry. Co.* v. *Kansas*, *Northwestern Mutual Life Insurance Co.* v. *Wisconsin* and the *Macallen* case, is entirely without reason. The statute involved in *Flint* v. *Stone Tracy Co.* measured the tax by "entire net income," exactly as our statute measures it. The Court, although discussing the point (see pp. 162-165), found no difficulty in holding that there had been no unlawful attempt to tax the exempt income. That case and the present one may not be distinguished in the slightest particular.

Appellant has quoted from a brief filed by the State Tax Commission, *amicus curiae*, in the *Macallen* case, to the effect that the taxing systems of New York and Massachusetts are so nearly identical in the particulars affected by that suit that whatever decision should be reached by the court would doubtless apply with like force to the State of New York. This brief was not filed by the Attorney General but by other counsel. The statement quoted indicates merely that such counsel were unaware of the deliberate attempt of Massachusetts to reach the non-taxable income or that they failed to sense the importance of that fact. We think that we have established that there is a real and vital distinction between the *deliberate attempt* of Massachusetts to reach tax-exempt income from government bonds and the *incidental and fortuitous* inclusion of income from copyrights in the measure of the New York tax.

In a brief submitted, *amicus curiae*, on the application for a rehearing in the *Macallen* case, we expressed doubt that this Court intended to limit its decision to cases where the State Legislature had deliberately set out to reach non-taxable income, for the reason that under it, as so interpreted, there would exist a situation where certain states would be lawfully including income from tax-exempt securities in the measure of the tax while those states which had offended by specifically

including such income would never thereafter be able to include it. The doubt which we entertained upon that subject was quite effectually removed by the court's denial of the petition for rehearing. Moreover, the *Macallen* case involved the question of exemption of interest on federal, state and municipal bonds, rather than income from copyrights, which, as we have seen, has had quite a different history both in New York and Massachusetts. No state, so far as we know, has a statute expressly including in the measure of a franchise tax income from copyrights.

The Amendments of the New York Statute

The appellant refers to an amendment of § 208, subd. 3, of the Tax Law made by L. 1924, ch. 329, which added to the definition of net income, income from federal, state and municipal bonds, and to an amendment of § 209 of the Tax Law made by L. 1927, ch. 479, which added the following sentence:

> "However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax."

It is freely admitted that the purpose of the first of these amendments was to include income from those tax-exempt securities which the Court of Appeals in the *Standard Oil* case (237 N. Y. 142) had held not to be included in the federal definition of gross income, then in use by the State. The Court of Appeals did not indicate any doubt that such income might lawfully be included, in fact it expressly held that income from United States bonds was to be included to the extent that it fell within the federal definition of gross income.

and the Legislature was justified in believing that it had the right to include it. In view of the fact that the income used as the measure of the tax is the income of a previous year—not the income of the year for which the tax is imposed, as in the *Macallen* case—we think that the Court of Appeals and the Legislature were right. It is difficult to see how a privilege tax for one year may be said to be a *direct* tax on income received in a preceding year. But, however that may be, the questions involved in the present case are in no way affected by the constitutional validity or invalidity of that amendment. If the amendment is invalid, it is to be exscinded and is no part of the law. The exscission in no way affects the law as originally enacted. And it is under the law as originally enacted, when the State depended solely upon the federal statute for its definitions of both gross and net income, rather than under the amendment, that the tax in the instant case was assessed. Income from copyrights was included by the Tax Commission in computing it because such income was included in federal gross income and not deductible in determining federal net income. This was done under the *original* statute and was in no way affected by any amendment of the statute, constitutional or otherwise.

The second amendment was designed, of course, to permit of the inclusion of income from securities which the Court of Appeals had held in *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, *supra*, could not be included without also including the securities themselves in the segregation of assets used for the purpose of allocating income to sources within and without the State. It has no relevancy on the present question.

As we have already pointed out, neither patents nor copyrights are mentioned in our statute. Neither are they mentioned in, or affected by, any amendment of

the statute, and the discussion of the amendments which has come into the case is entirely extraneous and foreign to the point.

We are unwilling to allow to go unanswered the appellant's intimation that the purpose of the State in imposing an excise rather than a direct property tax may have been to include otherwise exempt income in the measure of the tax. Corporations have been taxed by this State upon their corporate franchises for over fifty years. See *Home Insurance Co.* v. *New York*, *supra*. The purpose is, of course, to tax that intangible right which is possessed by corporations and not by individuals, so well described by Mr. Justice Day in *Flint* v. *Stone Tracy Co.*, *supra* (pp. 161, 162):

> "In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the

> same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."

We submit that the court below was quite right when it said (R. fol. 60):

> "It is urged that the same situation is presented here as was in the *Macallen* case but we think not. * * * We think it now beside the point that the New York law as amended may, in so far as interest on federal bonds is concerned, be the result of motives not unlike those responsible for the Massachusetts law held invalid in the *Macallen* case. That question is not before us. Copyright income was not excluded from gross income in the exception in the federal law referred to in *People ex rel. Standard Oil Company* v. *Law et al., supra.* Now, as before, it enters into the measure of the franchise tax purely as a casual incident of that tax."

Decisions Since the Macallen Case

Appellant has cited two decisions by State courts and one by the California State Board of Equalization which have been handed down since this Court's decision in the *Macallen* case, viz.:

> *Aberdeen Savings Assn.* v. *Chase*, 57 Wash. 225; 289 Pac. 536;
> *Quicksafe Mfg. Corp.* v. *Graham*, 161 Tenn. 46, 29 S. W. 253;
> *Matter of Vortox Mfg. Co.*, U. S. Daily, Aug. 13, 1930, p. 1853.

In the first of these cases, it appeared that the State of Washington statute under consideration imposed upon banks and financial corporations a tax measured

by net income, and that by the *express terms* of the statute "all interest received from Federal, State, municipal or other bonds" was to be included (p. 538 of Pacific Rep.). The inclusion of such income from exempt securities was neither incidental or fortuitous, and the court, three judges dissenting, was of the opinion that it brought the case within the decision of this Court in the *Macallen* case.

In *Quicksafe Mfg. Corp.* v. *Graham*, *supra*, the court based its decision upon *Gillespie* v. *Oklahoma*, *supra*, and *Long* v. *Rockwood*, *supra*, both cases involving the direct taxation of income, and seems to have entirely overlooked the fact that the tax which it was considering was not a tax upon income at all but one upon the corporate franchise, a distinction which is of controlling importance. No mention whatever was made in the opinion of such cases as *Flint* v. *Stone Tracy Co.*, *Home Ins. Co.* v. *New York*, *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, or of the *Macallen* case.

In *Matter of Vortex Mfg. Co.*, *supra*, the Board of Equalization, although expressing some doubt of the constitutionality of the California statute, sustained the action of the franchise tax commissioner in overruling the protest of the corporation.

The appellant and all other corporations holding assets immune from direct taxation have from the first enactment of our statute paid without question or protest a tax measured in part by the income from such assets. It was not until the *Macallen* case, which the appellant construes as so revolutionary as to overrule all of the court's previous decisions upon the subject, that the claim was advanced that exempt income could not be included in the measure. That the *Macallen* case contains no such startling doctrine is shown by the statement of Mr. Justice Sutherland (p. 634) that taxes

such as the one there involved *uniformly for a century* had been condemned by the court as unconstitutional.

The learned Court below expressed the thought better than we can when it said (R. fol. 59):

> "Were it not for *Macallen v. Massachusetts*, 279 U. S. 620, we should have no hesitation in reaching the conclusion that in imposing this tax a constitutionally permissible method of measurement has been used. And that decision, though much relied upon by the plaintiff, does not seem to change the general principle developed in the decisions above referred to but tends to mark the limits of what is mere casual effect upon tax exempt property which will be tolerated in recognizing and trying to overcome the practical difficulties confronting two governments, State and Nation, in raising revenue within the same geographical area."

POINT II

The appellant is not entitled to the injunctive relief asked, even though royalties from copyrights may not be included in the measure of the tax, because its tender of the tax due even on that theory was insufficient in amount.

A

The appellant, in computing the tax which it has tendered, has deducted income from copyrights which it did not own.

We think that it is conceded that, if royalties from copyrights may not be included in the measure of the tax, no one except the owner of the copyrights is entitled to claim the exemption.

In the instant case, it does not appear that the appellant was the owner of the copyrights from which more than an inconsiderable part of its claimed exempt income was derived. The original allegation, which was contained in the appellant's report to the State Tax

Commission and was incorporated in the bill of complaint by reference, was that the copyrights were owned "by it *and its affiliated companies.*" From its bill of complaint and supporting affidavit it further appears that the bulk of the copyrights were issued to and stand in the name of other companies.

Notwithstanding these admissions, it is claimed that, by virtue of some arrangement with these other companies by which the appellant paid the cost of production and under which these companies received certain remuneration, the appellant became the owner. But these other companies must have been the owners at the time they obtained the copyrights. At what time, then, did title pass to the appellant?

The statute provides that a copyright may be assigned, granted or mortgaged by an instrument in writing signed by the proprietor of the copyright (Mar. 4, 1909, C. 320, § 42, 35 Stat. 1084).

In *Public Ledger Co.* v. *Post Printing and Publishing Co.*, 294 Fed. 430, 433, the Circuit Court of Appeals said:

> "It seems to be conceded and is undoubtedly true that a written assignment is necessary to transfer the proprietorship of a literary work or the copyright of it, after the copyright has been secured."

There has been no assignment in writing of these copyrights to the appellant and there is no proof that anything has occurred since the copyrights were obtained which would have the effect of transferring even the equitable ownership of them.

Upon the facts presented, it would appear that the remuneration which the other companies received, rather than the profits of the appellant from exploiting the copyrights of others, was the income which was exempt from taxation.

We think that the burden rests upon a corporation which seeks to enjoin public officers from performing duties placed upon them by statute to clearly allege and prove the facts which entitle it to such equitable relief, and we submit that the plaintiff's allegations on the subject of ownership, which to say the least are equivocal, are entirely insufficient to discharge such burden.

B

The appellant, in computing the tax which it has tendered, has deducted from its gross income not only the total amount of income from copyrights but also its expenses incurred in earning such income.

It is conceded by the appellant that its business is such that it is able to determine, not only the gross income from films which are copyrighted, which constitute about one-half of its business, but also the amount of its expenses in procuring such income, and it has alleged in its complaint, as amended, that the amount of such expenses for the year in question was $49,151.37.

It seems clear that, if such gross income is to be omitted, the amount of such expenses may not be deducted from its gross income from other sources in computing the net income which is to measure the tax.

We do not suppose that much law upon the subject can be found, for the reason that both the Federal Government and the states have always either taxed such income or included it in the measure of their franchise taxes. There are, however, certain analogous situations.

The Federal Government may not directly tax income from state and municipal bonds, and the present Revenue Act (45 Stat. 795-883), which imposes a *direct* tax upon income, accordingly excludes interest on such bonds from gross income (§ 21, subd. b-4). Interest paid by the taxpayer on indebtedness to purchase or carry such bonds may not, however, be deducted from

its gross income in determining the taxable net income. Section 23, defining allowable deductions, provides (subd. b.):

> "Interest.—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title."

Similarly the Revenue Act excludes from gross income earned income of non-resident citizens received from sources without the United States (§ 116, subd. a), but the taxpayers' expenses properly allocable to or chargeable against such income may not be deducted. The section defining the exclusion provides:

> "Earned income from sources without the United States.—In the case of an individual citizen of the United States, a *bona fide* non-resident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 31; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

It is thus seen that wherever income from a tax-exempt source is excluded from gross income, the expenses in connection therewith may not be deducted.

The contention of the appellant would lead to the most absurd results, as will be seen from the following example. Suppose a corporation doing business within this State which had a gross income of $2,000,000, one-half of which was derived from copyrights and one-half from a non-exempt source, and which had expenses in

connection with the copyright business of $500,000 and a similar amount of expenses in connection with its other business. Its net income from the copyright business would be $500,000 and $500,000 from its taxable business. If the appellant's argument is sound, it could deduct from its gross of $2,000,000 its copyright income of $1,000,000 and its expenses of $1,000,000, and be relieved from the payment of any tax measured by income although it had enjoyed privileges granted by the State from which it had derived a net profit from non-exempt business of half a million dollars.

This is not an extreme example, as is shown by the fact that, in the instant case, the appellant claims the right to reduce its net income from concededly taxable business by nearly half (from $117,935.33 to $68,783.96) because of the expenses of the claimed non-taxable business.

Reference has been made to the fact that in such a case the corporation would be liable to a tax based on capital stock or on salaries. This is the minimum tax provision of the statute and is trifling compared with the tax measured by net income. It would produce in the instant case but $200 if based on the capital stock or $300 if based on the salaries, as against the assessment which has been made of $10,411.79 on the basis of net income.

If this statute is unconstitutional in its operation as to the appellant because of the taxation of income from tax-exempt sources, the most that the appellant can demand is that the tax be reduced to the extent necessary to prevent that result. That can be accomplished by deducting from the total gross income of the corporation the gross income from copyrights *less* the expenses of procuring the same.

The appellant cites on this point *National Life Insurance Co.* v. *United States*, 277 U. S. 508. We do not

see the application of that decision to any phase of the present controversy.

The situation in the *National Life Insurance* case was briefly this: The United States Revenue Act of 1921 imposed a direct net income tax upon life insurance companies. The statute provided that there should be deducted from the gross income (1) interest on tax-exempt securities and (2) an amount equal to the excess, if any, over the deduction specified in paragraph 1 (interest on tax-exempt securities) of 4 per centum of the mean of the reserve funds required by law. The effect of the statute was to give with one hand and take away with the other. The vice of it is summed up in one sentence taken from the prevailing opinion of Mr. Justice McReynolds (p. 519):

> "Thus, he (the Collector) required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities."

Answering the claim that there was no obligation on Congress to grant the second deduction, the learned Justice said (p. 522):

> "Congress had no power purposely and directly to tax state obligations by refusing to their owners *deductions allowed to others.*"

In the instant case, the denial of the deduction of the expenses of the business of leasing copyrighted films does not result in a tax greater than it would have been had the appellant not conducted that business; it results in exactly the same tax that it would have paid if it had no copyright business at all. What the appellant is demanding is that the tax on its taxable business be fixed at a much less sum because it happens also to have the copyright business.

Neither in the instant case are the deductions, which the plaintiff claims, deductions which are allowed to others. In the *National Life Insurance* case there was an arbitrary deduction of a percentage of the reserve funds required by law, which was allowed to all life insurance companies regardless of whether they held exempt securities or not. Under the statute we are now considering, no deduction of the expenses of an exempt business is allowed to anyone.

The appellant treats the subject as one of pure statutory construction. It is not that. If this Court shall hold that the application of the statute to the plaintiff has produced an unconstitutional result (a contingency which we do not anticipate), it will be called upon to determine to what extent the result is unconstitutional. The appellant concedes that it has no constitutional right to such a deduction. What, then, is the extent to which it may demand relief? Clearly no more than the elimination from its net income of so much thereof as was received from the copyright business.

CONCLUSION

The order of the District Court should be affirmed, with costs.

Respectfully submitted,

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APPENDIX A

XXX Columbia Law Review 1070-1071 (November 1930)

TAXATION—CONSTITUTIONAL LAW—CONSTITUTIONALITY OF FRANCHISE TAX MEASURED BY NET INCOME FROM COPYRIGHT.—Plaintiff, a New York corporation, seeks to enjoin defendant from collecting that part of a franchise tax[1] which results from using income derived from a copyright as a measure of the tax. *Held*, petition dismissed. A franchise tax measured by net income, though derived in part from a copyright, is an excise tax and therefore valid. *Educational Films Corporation of America* v. *Ward, Atty-Gen. of New York*, 41 F.(2d) 395 (S. D. N. Y. 1930).

The original pronouncement of the doctrine that a state may not tax a federal instrumentality[2] included the reservation that "all subjects over which the sovereign power of the state extends are objects of taxation * * *."[3] *A priori*, a property tax on federal stock was held invalid[4] but various excise taxes within the jurisdiction of the state were upheld though measured in part by income from federal instrumentalities.[5] Since *Western Union Telegraph Co.* v. *Kansas*[6] the Supreme Court of the United States has at times abandoned the subject test in favor of an economic criterion.[7] The latter inquires whether or not the instrumentality is in fact burdened, which seems a more practical and desirable test.[8] Still, the problem of validity often resolves itself into a determination of whether the tax, irrespective of the nomenclature employed by the state legislature or

1. N. Y. Tax Law, art. 9A, § 208 (3), 209, 211 (2), 215.
2. *McCulloch* v. *Maryland*, 4 Wheat. 316 (U. S. 1819).
3. *Ibid.*, at 429.
4. *Western* v. *City Council of Charleston*, 2 Pet. 449 (U. S. 1829).
5. *Society for Savings* v. *Coite*, 6 Wall. 594 (U. S. 1829); *Home Insurance Co.* v. *New York*, 134 U. S. 594, 10 Sup. Ct. 593 (1890); *Plummer* v. *Coler*, 178 U. S. 115, 20 Sup. Ct. 829 (1900).
6. 216 U. S. 1, 30 Sup. Ct. 190 (1910).
7. See Powell, *Indirect Encroachment on Federal Authority* (1918) 31 Harv. L. Rev. 321, 325.
8. See Note (1930) 30 Columbia Law Rev. 92, 103.

court, is on an immune subject or on a privilege granted by the taxing power.[9] So a license tax on domestic insurance companies was held invalid as a tax on a federal instrumentality when measured by gross income derived in part from United States bonds[10] although when measured by net income a similar tax was sustained.[11] In *Macallen Co.* v. *Massachusetts*,[12] a divided court, laying great stress on the fact that an amendment to the tax statute had withdrawn the exemption granted on income from federal securities, held a franchise tax, measured by net income, invalid as a covert attempt to tax income from such securities. This case might be given a narrow construction based solely on the legislative history[13] or else one much broader in effect, namely, to overrule *Home Insurance Co.* v. *New York*[14] and *Flint* v. *Stone Tracy*.[15] In *Long* v. *Rockwood*,[16] it was only by a five to four decision that an income tax was held invalid when assessed on patent royalties, due to the reluctance of the four dissenting justices to consider a patent a federal instrumentality. The constitutional provision makes no distinction between patents and copyrights.[17] If appealed, the tax in the instant case could be held unconstitutional only by combining the holding of *Long* v. *Rockwood* with the broader interpretation of *Macallen* v. *Massachusetts*. It is to be hoped that this result will not be reached as it is difficult to trace the relation between such a tax and a detrimental effect on the federal government.

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9. See *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140, 48 Sup. Ct. 55, 56 (1927).

10. *Ibid.*

11. *Home Insurance Co.* v. *New York*, *supra* note 4; *Flint* v. *Stone Tracy*, 220 U. S. 107, 31 Sup. Ct. 342 (1911); *cf. Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45 (1920).

12. 279 U. S. 620, 49 Sup. Ct. 432 (1928).

13. See *Aberdeen Savings & Loan Ass'n.* v. *Chase*, 289 Pac. 536, 543 (Wash. 1930); note (1929) 43 Harv. L. Rev. 280.

14. *Supra* note 5.

15. *Supra* note 11.

16. *Long* v. *Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928).

17. United States Constitution, art. 1, § 8.

APPENDIX B

NEW YORK TAX LAW

ARTICLE 9-A

Franchise Tax on Business Corporations

Section 208. Definitions.

209. Franchise tax on corporations based on net income.

210. Corporations exempted from article.

211. Reports of corporations to tax commission.

212. Reports by corporation on basis of fiscal year.

213. Reports to be sworn to; forms.

214. Computation of tax.

214-a. Taxation of corporations acquiring assets or franchises of other corporations.

215. Rate of tax.

216. Penalty for failure to report.

217. Powers of tax commission.

218. Revision and readjustment of accounts by tax commission.

219. Review of determination of tax commission by certiorari and regulations as to writ.

219-a. Audit and statement of tax.

219-b. Notice of tax.

219-c. When tax payable.

219-d. Corrections and changes.

219-e. Warrant for the collection of taxes.

219-f. Action for recovery of taxes; forfeiture of charter by delinquent corporations.

219-g. Deposit of revenues collected.

219-h. Disposition of revenues collected.

219-i. Secrecy required of officials; penalty for violation.

219-j. Exemption from certain other taxation.
219-k. Limitation of time.
219-l. Personal property defined.

§ 208. **Definitions.** As used in this article:

1. The term "corporation" includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument;

[Amended by ch. 376, L. 1922.]

2. The words "tangible personal property" shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt;

3. The term "entire net income" means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds, except as otherwise provided by section two hundred and nine of the tax law, and without deduction for taxes paid to the government of the United States on either profits or net income and without deduction of any specific amount allowed by any taxing authority; but losses sustained by the corporation in other fiscal or calendar years whether deducted by the government of the United States or not shall not be deducted.

[Amended by ch. 582, L. 1928.]

§ 209. **Franchise tax on corporations based on net income.** For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except

corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income received as dividends on stocks or any interest received on bonds of any character, and without deduction for taxes paid on either profits or net income to the government of the United States or for any specific deduction allowed by any other authority, except that the entire net income of a corporation not organized under the laws of any state within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact and determined as hereinbefore provided rather than the amount earned in the United States or the amount returned to the United States treasury department, or as otherwise provided by section two hundred and fourteen of the tax law. However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax.

[Amended by ch. 385, L. 1929.]

§ 210. Corporations exempted from article. 1. Corporations wholly engaged in the purchase and sale of, and holding title to, real estate for themselves, and also corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty

years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold;

2. Corporations whose sole business consists of holding the stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law; and

3. Corporations liable to tax under sections one hundred and eighty-four to one hundred and eighty-seven inclusive of this chapter, banks, banking associations, savings banks, institutions for savings, trust companies, title guaranty, insurance or surety corporations, and corporations taxable under articles nine-b and nine-c;

4. Farmers', fruit growers', and other like agricultural corporations organized and operated on a co-operative basis for the purposes expressed in and as provided under the co-operative corporations law of the state of New York.

Shall be exempt from the payment of the taxes prescribed by this article.

This section, as hereby amended, shall be construed as having been in effect as of March thirty-first, nineteen hundred and twenty-seven.

[Amended by ch. 583, L. 1928; subd. 4 added by ch. 363, L. 1929, effective April 8, 1929.]

§ 211. Reports of corporations to tax commission. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preced-

ing said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income wherever earned and as though organized under the laws of this state, and instead of stating its income as returned to the United States treasury department. If any corporation is not subject to a franchise tax based on net income, and is incorporated and issues capital stock, or increases its issued capital stock, after the thirtieth day of June and prior to the first day of November in any year, it shall forthwith report to the tax commission the amount of such increase or issue and shall be taxable thereon as though increased or issued prior to the first day of July and as provided by section two hundred and fourteen of the tax law.

2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law, except as provided in subdivision one of this section. If the corporation shall claim that the return made to the United States treasury department was inaccurate, the amount claimed by it to be the net income for such period shall be specified. If any deduction has been allowed for losses sustained by the corporation in prior years the amount so allowed and deducted shall be specified.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of

a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the manufacture by it of personal property or the purchase or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corporations within the state of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the state, the city, village or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making any computation required by this article, or for the purpose of comparison with former reports to determine whether or not such reports were erroneous or fraudulent.

8. Any corporation taxable hereunder upon its entire net income may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. Corporations having no net income shall, however, complete the segregation of assets in every case.

9. Any corporation liable to report under this article and owning, or controlling, either directly or indirectly, substantially all of the capital stock of another corporation, or of other corporations, may be required to make a consolidated report showing the combined net income, such assets of the corporation as are required for the purposes of this article, and such other information as the tax commission may require, but excluding intercorporate stockholdings and intercorporate accounts. Any corporation liable to report under this article and owned or controlled, either directly or idirectly, by another corporation may be required to make a report consolidated with the owning company, showing the combined net income, such assets of the corporation as are required for the purposes of this article, and such other information as the tax commission may require, but excluding intercorporate stockholdings and intercorporate accounts. In case it shall appear to the tax com-

mission that any arrangement exists in such a manner as to improperly reflect the business done, the segregable assets or the entire net income earned from business done in this state, the tax commission is authorized and empowered, in such manner as it may determine, to equitably adjust the tax and to eliminate any assets included in the segregation thereof, provided only that any income directly traceable thereto be also excluded from entire net income.

The tax commission may permit or require the filing of a combined report where substantially all the capital stock of two or more corporations liable to report under this article is owned or controlled by the same interests. The tax commission may impose the tax provided by this article as though the combined entire net income and segregated assets were those of one corporation, but in the computation dividends received from any corporation whose assets, as distinguished from shares of stock, are included in the segregations, shall not be included in net income, or may, in such other manner as it shall determine, equitably adjust the tax.

10. Where any corporation liable to taxation under this article conducts the busines, whether under agreement or otherwise in such manner as either directly or indirectly to benefit the members or stockholders of the corporation, or any of them, or any person or persons, directly or indirectly interested in such business by selling its products or the goods or commodities in which it deals at less than a fair price which might be obtained therefor, or where such a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning the substantial portion of its capital stock in such a manner as to create a loss or improper net income, the tax commission may require such facts as it deems necessary

for the proper computation provided by this article, and may for the purpose of the act determine the amount which shall be deemed to be the entire net income of the business of such corporation for the calendar or fiscal year, and in determining such entire net income the tax commission shall have regard to the fair profits which, but for any agreement, arrangement or understanding, might be or could have been obtained from dealing in such products, goods or commodities.

11. If it shall appear to the tax commission that the segregation of assets shown by any report made under this article does not properly reflect the corporate activity or business done, or the income earned from corporate activity or from business done in this state because of the character of the corporation's business and the character and location of its assets, the tax commission is authorized and empowered to equitably adjust the tax upon the basis of the corporate activity or the business done within and without the state rather than upon capital or assets employed.

12. Whenever a corporation exempted by either subdivision one or two of section two hundred and ten of the tax law owns a controlling interest in any corporation taxable under article nine-a, or is owned or controlled by any corporation taxable under article nine-a, and any part of the property of the corporation exempted by either subdivision one or two of section two hundred and ten is used or occupied in the conduct of the business of the corporation taxable under article nine-a, the exemption extended by subdivisions one and two of section two hundred and ten of the tax law shall be annulled, and they may be required to make a consolidated report including the segregable assets and the entire net income of the consolidated companies for the

purposes of taxation and be taxed under article nine-a of the tax law.

[Amended by ch. 145, L. 1929.]

§ 212. Reports by corporation on basis of fiscal year. A corporation which reports to the United States treasury department on the basis of its fiscal year, may report to the tax commission upon the same basis, except as provided in section two hundred and fourteen-a of this chapter. Any corporation which has been permitted to change the period for which it shall make its report shall, in its next report to the tax commission, include its entire net income which has not been used or included in measuring a franchise tax to this state whether such income arose over a period of more or less than one year.

[Amended by ch. 507, L. 1922.]

§ 213. Reports to be sworn to; forms. Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true. Blank forms of report shall be furnished by the tax commission, on application, but failure to secure such a blank shall not release any corporation from the obligation of making a report herein required. The commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

[Added by ch. 726, L. 1917.]

§ 214. Computation of tax. If the entire business of the corporation be transacted within the state, the tax imposed by this article, if imposed upon the entire net income, shall be based upon the entire net income of such corporation for such fiscal or calendar year as de-

fined in section two hundred and eight of this chapter, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within the state; (b) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within and without the state; and (b) the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

6. The average total value of stocks of other corporations owned by the corporation.

7. In case any report is made as provided by subdivisions nine, ten, eleven and twelve of section two hundred and eleven of the tax law, the tax commission may assess the tax against either of the corporations whose assets or net income are involved in the report and upon the basis of the combined entire net income and the combined segregated assets of the corporations and upon such other information as it may possess, or may adjust the tax in such other manner as it shall determine to be equitable.

8. If any corporation has been permitted to change the period for which it shall make its report, it shall be taxed upon the entire net income which has not been used or included in measuring a franchise tax to this state as though the entire net income had been earned within one year.

9. Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state

in accordance with the value of the physical property in and out of the state representing such share stock.

10. It is further provided that every domestic corporation for the privilege of exercising its franchise in this state, other than one exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of (1) not less than ten dollars and (2) not less than one mill upon each dollar of its issued capital stock at its face value, and (3) not less than would be produced by applying a rate of two per centum to a base consisting of the entire net income plus salaries and other compensation paid to all elected or appointed officers, and to any stockholder owning in excess of five per centum of the issued capital stock of the corporation, excepting dividends, and after deducting from the base six thousand dollars and any deficit for the reported year; whichever would result in the largest amount of tax. If such corporation actually maintains a regular place of business outside of the state of New York and actually employs capital outside of the state of New York, then such tax shall be computed upon such a part of its issued capital stock at its face value as the amount of its gross assets in this state bears to its gross assets wherever located. But if such corporation has stock without par value, then the base of the tax, with relation to such stock, shall be such issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the state tax commission, apportioned as herein provided. Every corporation, joint-stock company or association, organized, incorporated or formed under the laws of any other state, country or sovereignty, other than those exempted by section two hundred and ten of the tax law, shall pay a like tax for the privilege of carrying on business in a corporate or organized capacity in this state, to be computed upon the basis of measurement hereinbefore pro-

vided for the taxation of domestic corporations. Any corporation newly organized prior to November first of any year, or any foreign corporation beginning business in this state prior to November first of any year, and any corporation whose capital stock is increased between the thirtieth day of June and the first day of November in any year, either of which is not subject to a franchise tax on net income as provided in section two hundred and nine of this article, shall be subject to the minimum tax as hereinbefore provided, based on its issued capital stock as of the thirty-first day of October of such year.

If such corporation is subject to a tax under the provisions of this article of the tax law, and it maintains no regular place of business outside of this state, except a statutory office, it shall be taxed upon its entire net income, or entire issued capital stock, or otherwise, as hereinbefore provided.

[Amended by ch. 385, L. 1929.]

§ 214-a. **Taxation of corporations acquiring assets or franchises of other corporations.** (Omitted.)

[Amended by ch. 323, L. 1925.]

§ 215. **Rate of tax.** The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation or portion thereof taxable within the state, determined as provided by this article, unless taxable as provided in subdivision ten of section two hundred and fourteen of the tax law.

[Amended by ch. 385, L. 1929.]

§ 216. **Penalty for failure to report.** Any corporation which fails to make any report required by this article shall be liable to a penalty of not more than five thousand dollars to be paid to the state, to be assessed and collected in the manner provided for the assessment

and collection of taxes under this article, or in a civil action, at the instance of the tax commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by this article shall be liable to a penalty of not more than one thousand dollars, to be assessed and collected in like manner.

[Amended by ch. 507, L. 1922.]

§ 217. Powers of tax commission. The tax commission may for good cause shown extend the time within which any corporation is required to report by this article. If any report required by this article be not made as herein required, the tax commission is authorized to make an estimate of the net income of such corporation and of the amount of tax due under this article, from any information in its possession, and to order and state an account according to such estimate for the taxes, penalties and interest due to the state from such corporation. All the authority and powers conferred on the tax commission by the provision of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder.

[Amended by ch. 640, L. 1920.]

§ 218. Revision and readjustment of accounts by tax commission. If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon, and if it shall be made to appear upon any such hearing by evidence submitted to it, or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, or if it

appears that the tax as originally assesed was less than should have been exacted, the commission shall resettle the same according to law and the facts by increasing or diminishing the taxes and other charges, and adjust the accounts accordingly, and may, in its discretion, modify the penalty imposed for failure to report as provided in this article, and shall send notice of its determination thereon to the corporation forthwith.

If it appears from such reassessment that such corporation shall have paid an excess of tax under this article for the year for which such reassessment is made, the tax commission shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit, on filing with the commission such assignment, shall thereupon be entitled to credit upon the books of the tax commission for the amount thereof on the current account for taxes of such assignee, in the same manner and to the same effect as though the credit had originally been allowed in favor of such assignee, or the amount of such credit, without interest, may be refunded to such corporation out of any revenues received under this article to the credit of the state comptroller, at the direction of the state tax commission.

The amount or amounts of such excess shall be charged against the state treasury and the taxing district or districts in the proportions that such excess was originally credited or paid. In case the amount of current revenues credited to any taxing district, under this article, is not equal to the charge against any such taxing district on account of any such refund, revenues from all interest and penalties on deposit, under this article, may, until such taxing district revenues are available, be advanced and used for the purposes of such refund.

Any moneys thereafter credited to such taxing district, under this article, shall first be applied to the payment of any such advancement.

This section, as hereby amended, shall be construed as having been in effect as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen.

[Amended by ch. 184, L. 1929.]

§ 219. Review of determination of tax commission by certiorari and regulations as to writ. The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter.

No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within ninety days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state tax commission before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of all appeals.

[Amended by ch. 20, L. 1928.]

§ 219-a. **Audit and statement of tax.** The tax commission shall audit and state the account of each corporation known to be liable to a tax under this article, as hereinbefore provided, and shall compute the tax thereon and proceed to collect the same. The tax commission shall determine the portion of such tax to be distributed to the several counties and the amounts to be credited to the several cities or towns thereof, when the same is collected and shall certify the same to the state comptroller.

[Amended by ch. 507, L. 1922.]

§ 219-b. **Notice of tax.** Every report required by section two hundred and eleven of this chapter shall contain the post-office address of the corporation and lines or spaces upon which the corporation shall enter its entire net income. Notice of tax assessment shall be sent by mail to the post-office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the tax commission.

[Amended by ch. 628, L. 1919.]

§ 219-c. **When tax payable.** The tax hereby imposed shall be paid to the state tax commission on or before the first day of January of each year, or within thirty days after notice of the tax has been given as provided in section two hundred and nineteen-b of this chapter if such notice is given subsequent to the first day of December of the year for which such tax is imposed. If such tax be not so paid, or in the case of additional taxes, if not paid within thirty days after notice of such additional tax has been given as provided in section two hundred and nineteen-d of this chapter and such notice of additional tax is given subsequent to the first day of December of the year for which such additional tax is imposed, the corporation liable to such tax shall pay to

the state tax commission, in addition to the amount of such tax, or additional tax, ten per centum of such amount, plus one per centum for each month the tax or additional tax remains unpaid, but the state tax commission upon submission to it of satisfactory proof that the failure to pay such taxes or additional taxes, within the time prescribed in this article, was not wilful or evasive, may modify the exaction. Each such tax or additional tax shall be a lien and binding upon the real and personal property of the corporation liable to pay the same until the same is paid in full. But the lien of each such tax or additional tax shall be subject to the lien of any mortgage indebtedness existing against real property previous to the time when the tax or additional tax is due and payable and where such mortgage indebtedness has been incurred in good faith and was not given, directly or indirectly, to any officer or stockholder of the corporation owning such real property, whether as a purchase money mortgage or otherwise. Where title to real property passes from an individual, or from a corporation owing no franchise tax or additional tax, to another corporation which is in default for such tax or additional tax, the lien herein provided shall not be enforceable except as to any equity after the prior mortgage encumbrance.

The tax commission may, upon application made to it and the payment of a fee of five dollars, release any real property from the lien of any franchise tax due, and or to become due, imposed by articles nine and/or nine-a of the tax law, provided payment be made to the state tax commission of such a sum as the tax commission shall deem adequate consideration for such release, or deposit be made of such security or such bond be filed as the tax commission shall deem proper to secure payment of any franchise tax or taxes the lien of which is being released. The application for such release shall

contain an accurate description of the property to be released together with such other information as the tax commission may require. Such release shall be given under the seal of the tax commission and may be recorded in any office in which conveyances of real estate are entitled to be recorded.

[Amended by ch. 170, L. 1929, effective July 1, 1929.]

§ 219-d. **Corrections and changes.** If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after the receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the possession of the commission, the entire net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of sections one hundred and ninety-five and two hundred and seventeen of this chapter is hereby granted to it in respect to the ascertainment of such entire net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the entire net income as changed or corrected for such fiscal or calendar year but without change of the segregation of assets upon which the original assessment was based, such reaudit to be according to the entire net income so ascertained by the

tax commission. The proceedings and determinations of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the tax commission for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee; or the amount of such credit, without interest, may be refunded to such corporation out of any revenues, received under this article, to the credit of the state comptroller, at the direction of the state tax commission. The amount or amounts of such excess shall be charged against the state treasury and the taxing district or districts in the proportions that such excess was originally credited or paid. In case the amount of current revenues credited to any taxing district under this article, is not equal to the charge against any such taxing district on account of any such refund, revenues from all interest and penalties on deposit, under this article, may, until such taxing district revenues are available, be advanced and used for the purposes of such refund. Any moneys thereafter credited to such taxing district, under this article, shall first be applied to the payment of any such advancement. If

from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax.

This section, as hereby amended, shall be construed as having been in effect as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred seventeen.

[Amended by ch. 183, L. 1929.]

§ 219-e. **Warrant for the collection of taxes.** (Omitted.)

[Amended by ch. 551, L. 1926.]

§ 219-f. **Action for recovery of taxes; forfeiture of charter by delinquent corporations.** (Omitted.)

[Amended by ch. 297, L. 1929.]

§ 219-g. **Deposit of revenues collected.** (Omitted.)

[Amended by ch. 507, L. 1922.]

§ 219-h. **Disposition of revenues collected.** (Omitted.)

§ 219-i. **Secrecy required of officials; penalty for violation.** (Omitted.)

§ 219-j. **Exemption from certain other taxation.** After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property, or on capital stock as provided for in section twelve of this chapter.

[Amended by ch. 286, L. 1926.]

§ 219-k. **Limitation of time.** The provisions of the code of civil procedure relative to the limitation of time

of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article.

[Added by ch. 726, L. 1917.]

§ 219-l. Personal property defined. The term "personal property," for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructures, and removable without material injury thereto. The term "personal property," as used in such section, shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee.

[Amended by ch. 628, L. 1919.]